Supreme Court, U.S.
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No. 02-359

In the

Supreme Court of the United States

AUBREY E. HENRY,

Petitioner,

v.

JEFFERSON COUNTY
PLANNING COMMISSION, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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16 pp

QUESTION PRESENTED

The lower court decided that a fee simple landowner applying for a permit to use his land does not have a property interest, and is therefore not entitled to substantive due process in the permitting process, stating: "We have made clear that when a 'land-use regulation[] grant[s] discretion to [government] officials with regard to approval of the proposed development, [a landowner] possess[es] no property interest protected by the Fourteenth Amendment.' *Gardner v. City of Baltimore*, 969 F.2d 63, 64 (4th Cir. 1992)."

Is a landowner seeking a permit entitled to substantive due process protection even when he does not have a "vested right" to the permit?

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INTEREST OF AMICUS CURIAE[1]

Pacific Legal Foundation (PLF) is a nonprofit public interest legal foundation that specializes in defending property rights and other individual liberties. Since its inception 29 years ago, PLF has had extensive litigation experience in cases involving individuals adversely affected by the government regulation of private property.

Pacific Legal Foundation attorneys have represented other property owners before this Court when regulatory agencies have taken rights in property without the payment of just compensation, *see, e.g.*, *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and PLF has participated as amicus curiae in almost all of the major Takings Clause cases before this Court in the past 25 years. Because of the Foundation's experience in the field of regulatory takings, it can add a unique perspective that will assist this Court's consideration of this case.

Pursuant to Supreme Court Rule 37, written permission from all parties for Pacific Legal Foundation to file this brief has been lodged with the Clerk of this Court.

STATEMENT OF THE CASE

Amicus adopts Petitioner's Statement of the Case.

SUMMARY OF ARGUMENT AND INTRODUCTION

Must a landowner first obtain a vested right to utilize real property in a particular manner before rights of substantive due

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[1] Pursuant to Supreme Court Rule 37.6, Amicus Curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and, furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

process attach to his right to use the property in that particular manner? To ask this question is to demonstrate the causal flaw in its logic. If one can assume, as this Court has previously held, that the ability to put property to reasonable use is a right rather than a government benefit, then the protections of the Due Process Clause must be attached to the permitting process itself. Due process rights that attach because a real property interest is involved is in contrast to those circumstances where the underlying rights arise out of governmental benefits—where there is no inherent *right* to the benefit in the first place—where there is no *right* until the government creates the right. In *those* circumstances, there must be established a right in the benefit first in order to bring a challenge based on the Due Process Clause. However, where traditional property rights are at issue, those rights which are specifically referred to in the Due Process Clause, it defeats the right itself to require an additional "entitlement" before the protections of the Due Process Clause are to attach. Otherwise, property rights would truly become a "poor relation" of the other rights that are specifically enumerated in the Constitution. Some courts have understood this distinction, others have not. This has left the ability of landowners to seek protection under the Due Process Clause largely to geographic chance. This conflict in the state and lower federal courts can only be resolved by this Court. In fact, this Court is currently addressing this very issue in *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, Case No. 01-1269. For that reason alone, the petition for writ of certiorari should be granted with a final disposition held until this Court issues an opinion in that case.

I

THE CONSTITUTIONAL RIGHT TO MAKE REASONABLE USE OF LAND IS A PROPERTY INTEREST PROTECTED BY THE DUE PROCESS CLAUSE

The court below found that Henry had "failed to establish that he possesses a property interest in the conditional use permit to build the townhouses." Opinion of Fourth Circuit in *Henry v. Jefferson County Planning Commission*, Case No. 01-1948, May 7, 2002, *reproduced in* Petitioner's Appendix at App. 10. The court reasoned that "'[a]ny significant discretion conferred upon the local agency [to issue or deny the permit] defeats the claim of a property interest.'" *Id.* (citation omitted). That analysis—characterizing protected property interests in the land use context as including *only* those where a "landowner is *entitled* to a permit," *id.*, turns the vested rights analysis of *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972), on its head by failing to recognize ownership of land as a constitutionally protected property interest. And the result is ironic. This Court's expansion of the definition of property interests protected by the Due Process Clause in *Roth* now serves as the basis for denying due process protection for the property interests specifically mentioned in the Due Process Clause of the Constitution as entitled to protection.

As discussed at length by Professor Mandelker, the notion that one must have a vested right to a permit before one can challenge a permit denial, a notion that he refers to as the "entitlement rule," has eluded a consistent treatment by the state and lower federal courts. It is also an issue that this Court has not yet addressed:

> Whether the Court would apply the entitlement rule to substantive due process claims brought by landowners is not clear. Opinions by the Court and individual Justices point in both directions, and the

> lower federal courts also disagree on whether substantive and procedural due process are equivalent.

Mandelker, Daniel R., *Evolving Voices in Land Use Law: A Festschrift in Honor of Daniel R. Mandelker: Part II: Discussions on the National Level: Chapter 2: Property Rights: Entitlement to Substantive Due Process: Old Versus New Property in Land Use Regulation*, 3 Wash. U. J.L. & Pol'y 61, 81-82 (2000).

In *Dolan v. City of Tigard*, 512 U.S. 374 (1994), this Court announced the desire to rehabilitate the status of property protection under the Takings Clause from that of a "poor relation" compared to the other individual rights enumerated in the Bill of Rights. *Id.* at 392. Yet, various federal circuits, give short shrift to property rights when reviewing government regulations under the Due Process Clause.

The Due Process Clause guarantees against deprivations of "life, liberty, or property, without due process of law." U.S. Const. amends. V, XIV, § 1. Due process has long been understood to mean more than mere procedural formalities. Due process embraces the fundamental concept that certain government decisions must instead relate to a legitimate end of government and may not be made for no reason or for a bad reason. *See Lawton v. Steele*, 152 U.S. 133, 136-37 (1894); *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928). This concept is the essential difference between the rule of law and arbitrary government, between a government of laws and one of men. Certain public decisions by their very nature may be arbitrarily decided—such as the color of the wallpaper in city hall, the number of members of a board or commission, maybe even the generally applicable tax rate. But decisions to restrict the liberty of individuals or their enjoyment of their property must be justifiable by one of the legitimate ends of government, the promotion of health, safety, morals, or general welfare.

"Because we said so" might be an acceptable if somewhat disserving rule for a paternalistic relationship but has no place in a system of limited government designed to protect and defend the rights of free men and women.

Lower court decisions abound upholding restrictions on the use of property without regard for the reasons behind these restrictions. This treatment of property rights under Due Process review is ameliorated somewhat by the heightened protection for property rights mandated by the Takings Clause. Thus, regulation of the use and enjoyment of property must have more than a mere hypothetical connection with a legitimate end of government—it must *in actuality* "substantially advance" such an end. *Dolan*, 512 U.S. at 385; *Nollan v. California Coastal Commission*, 483 U.S. at 834 n.3; *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). This Court has thus recognized that the government's authority over private property is proper only when it *will further* a legitimate goal. If no such goal is furthered, then government cannot mandate a restriction on the use of property—unless it decides to condemn that property right.

The Takings Clause, however, is not a substitute for the protections of the Due Process Clause. The former guarantees only that Just Compensation be paid for the property taken, it does not stop government misconduct. The latter can invalidate the government action and could provide for the payment of actual damages to compensate for the personal injury inflicted upon an individual who has been the subject of unlawful treatment at the hands of the government. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 197 (1985); *see also Walz v. Town of Smithtown*, 46 F.3d 162, 169-70 (2d Cir. 1995) (emotional distress and pain and suffering damages recovered for substantive due process violation); *Coniston Corporation v. Village of Hoffman Estates*, 844 F.2d 461, 464 (7th Cir. 1988)

(injunctive relief and "full tort damages" available under Due Process Clause).

Unfortunately, many courts act as if the same interests in property that are protected by the Takings Clause are not protected by the Due Process Clause. It is as if the word "property" has been erased from the Due Process Clause or at least substituted with the words "entitlement" so that the Constitution reads: "Nor be deprived of life, liberty, or *entitlements*, without due process of law." If this situation persists, the Takings Clause would remain the "poor relation" of the other explicit guarantees such as those in the First Amendment. *Henry* (or alternatively, the pending case of *Buckeye*) affords this Court the opportunity to correct the situation and provide firm guidance to the lower courts.

As one commentator has also noted:

> [L]andowners and developers are learning from federal court decisions in some of the circuits that, as the *degree of discretion* that can be exercised . . . increases, the less likely they will be deemed to have any "property interest" to protect, regardless of how arbitrarily that discretion is exercised in a particular case.

Blaesser, Brian W., *Substantive Due Process at the Outer Margins of Municipal Behavior*, 3 Wash. U. J.L. & Pol'y 583, 585 (2000).

II

THIS COURT SHOULD RESOLVE THE CONFLICTS OVER WHETHER OWNERSHIP OF PROPERTY IS A SUFFICIENT INTEREST TO RECEIVE DUE PROCESS PROTECTION

The *Henry* court adopted the notion that ownership of private property does not involve a property interest protected by the Due Process Clause. This decision cannot be dismissed

as an anomaly, as several Circuit Courts of Appeals have also rejected the basic idea that ownership of property entails use and enjoyment of that property. These courts look instead for a "vested right" or "entitlement" to a particular permit in order for Due Process protections to be triggered.

This question should have been settled long ago. In 1829, speaking through Justice Story, this Court held that the American Revolution settled it, resulting in a government for which it would be repugnant to its very nature that "the rights of property are left solely dependent upon the will of a legislative body without any restraint." *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627, 657 (1829). The *Wilkinson* Court declared that "[t]he fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred," *id.*, and stressed "the right of the citizens to the free enjoyment of their property lawfully acquired." *Wilkinson*, 27 U.S. (2 Pet.) at 657-58.

One of the defining characteristics of property ownership is that the owners are allowed to use their land. *See Washington ex. rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121 (1928) (In a due process challenge to a land use regulation, the Court held: "The right of the trustee to devote its land to any legitimate use is properly within the protection of the Constitution."). Although government may seek to restrict the right of the owner to use property in a particular way, the regulatory process must not be confused with the property interest at stake. *Palazzolo v. Rhode Island*, 533 U.S. at 627 (Government cannot define property by its regulations; "The State may not put so potent a Hobbesian stick into the Lockean bundle.").

The passage of the years has not undermined recognition of the fundamental basis of property ownership in the American political system. For example, in discussing the importance of procedural due process to reduce the likelihood of *substantively* unfair treatment of property owners, this Court explained: "[T]he prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's *right to enjoy what is his*, free of governmental interference." *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972) (emphasis added).

Fundamental to the ownership of property is the use and enjoyment of that property, a concept that is embodied in the Constitution, and that implicates the Due Process Clause when restrictions affect that use and enjoyment. But the *Henry* court instead adopted the view that a property owner challenging the denial of a development permit must have an "entitlement" or vested right under state law—the right to receive that permit—in order to assert a Due Process claim. Petitioner's Appendix at App. 10. Unless an owner can demonstrate an entitlement under state law to proceed with a particular allowable use of the property, the owner cannot complain about the government's refusal to allow him to proceed, no matter how arbitrary, capricious, or unlawful that refusal may be.

A similar approach is taken by a number of federal Courts of Appeals. The Second, Sixth, and Eleventh Circuits all require the showing of the right to receive permission for a particular use of property in order to make out a Due Process

claim.[2] There is a sharp conflict between the circuits on this issue, as several courts of appeals have recognized that it is basic to ownership of property that one receive due process of law when use is restricted. *See, e.g., DeBlasio v. Zoning Board of Adjustment for the Township of West Amwell*, 53 F.3d 592, 601 (3d Cir. 1995) ("[O]ne would be hard-pressed to find a property interest more worthy of substantive due process protection than ownership."); *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 166 (7th Cir. 1994) ("An owner may build on its land; that is an ordinary element of a property interest."). *See also Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 263 (1977) (purchaser's "right to be free of arbitrary or irrational zoning actions").

The circuits that do not consider property to be property protected by the Due Process Clause have relied on this Court's decision in *Board of Regents of State Colleges v. Roth*, 408 U.S. at 577. But *Roth* merely held that a "legitimate claim of entitlement" to a "benefit," in that case a nontenured teaching position, was needed to trigger certain procedural protections. *Id.* *Roth* was broadening the class of claims that come under Due Process protection, not contracting them, by recognizing that "property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money." *Roth*, 408 U.S. at 572. It is incredible that Roth could be read to mean that "actual ownership of real estate" is not protected by due process.

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[2] *RRI Realty Corp. v. Incorporated Village of Southampton*, 870 F.2d 911, 917-18 (2d Cir. 1989) (must show no discretion in issuance of permit, or that issuance is "virtually assured" if under "narrowly circumscribed" discretion); *Marine One, Inc. v. Manatee County*, 877 F.2d 892, 894-95 (11th Cir. 1989) (property owner lacked "vested right" to permit).

This approach misapprehends what is at stake in due process land use claims. Unlike a professor seeking continued employment, property owners are not claiming the right to a government-established benefit when they seek to make use of their property. *Nollan*, 483 U.S. at 833 n.2 ("[T]he right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a 'governmental benefit.' "). One of the defining characteristics of property ownership is that the owners get to use their land. The permit process does not confer any benefits or rights upon the successful applicants. To the contrary, this process ***restricts*** existing rights to ensure that uses of property do not impair the rights of others. Given that the essence of property is the ability to exclude others from its use and enjoyment, it is ironic that so many courts have ruled that no property right exists until the owner has given up his preferences and agreed to uses acceptable to others.[3]

CONCLUSION

As Professor Mandelker has stated:

> No one gains in a legal environment where landowners suffer from arbitrary decision making or, conversely, where constitutional restrictions prevent necessary planning and land use regulation. Effective judicial review can establish constitutional guidelines that assure fair decisions and provide the necessary framework for land use policies. Access

[3] *See River Park*, 23 F.3d at 166 ("Zoning classifications are not the measure of the property interest but are legal *restrictions* on the use of property. . . . Licenses, permits, and classifications are important to owners because they reflect governmental promises not to interfere with private uses of property, but let us not confuse a decision not to intervene with the property itself.").

> to the courts is essential for judicial review. The entitlement rule denies landowners that access when they claim that a land use decision violates substantive due process. The constitutional basis for this rule is problematic and courts should abolish it.

Mandelker, *supra*, at 97. This Court should grant the petition for writ of certiorari.

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